



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101**

Reply To
Attn Of: OAQ-107

Mary Burg, Manager
Air Quality Program
State of Washington
Department of Ecology
P.O. Box 47600
Olympia, Washington 98504-7600

Re: Delegation of the Federal PSD Regulations to Ecology

Dear Ms. *Mary* Burg:

This letter is in response to your September 5, 2001, request for full delegation of EPA's Prevention of Significant Deterioration (PSD) permitting regulations to the Washington State Department of Ecology (Ecology). EPA staff have reviewed Ecology's current PSD rules (effective 9/15/01) and have determined that Ecology has adequate legal authority to implement and enforce a State PSD permitting program which is at least as stringent as the current federal PSD regulations at 40 CFR 52.21.

I have enclosed a revised delegation agreement for your consideration. If you agree with the terms of this delegation agreement, please sign and date it and return it to me. Once signed, we will publish notice of the delegation in the Federal Register to inform the public and the regulated community as to the PSD requirements in Washington.

If you have any questions on the specifics of the delegation agreement, please have your staff contact Dan Meyer at (206) 553-4150.

Sincerely,

Barbara McAllister, Director
Office of Air Quality

DB:BFM:cb
Enclosures (2)

cc: Alan Newman, Ecology



EPA Review of Ecology PSD Permitting Program WAC 173-400-141

Background

Section 110(a)(2)(C) of the Clean Air Act (CAA) requires each State Implementation Plan (SIP) to include a permit to construct program that meets the requirements of Part C - Prevention of Significant Deterioration of Air Quality (PSD). See CAA sections 160 to 169. EPA's regulations which set forth the requirements for SIP's include the requirements for PSD permitting programs in 40 CFR 51.166.

Where a State fails to adopt and submit a required element of a SIP, EPA is required by section 110(c) of the Act to disapprove such SIP and to promulgate a federal implementation plans (FIP). Since Washington has failed to submit an approvable PSD permitting program, EPA has promulgated a federal PSD permitting program into the Washington SIP. See 40 CFR 52.21(a) and 52.2497(2001). The federal PSD program has been in effect in Washington since 1975, and an approvable SIP PSD program has yet to be submitted.

EPA's federal PSD regulations are set forth at 40 CFR 52.21 (2001) (federal PSD regulations) and include a provision that allows EPA to delegate to a qualifying State or local agency the full or partial responsibility for conducting new source review and implementing and enforcing the federal PSD regulations. The Washington State Department of Ecology (Ecology) has had a partial delegation of the federal PSD program since 1982 (for all sources and all pollutants except NOx).

Description of Washington PSD Program

Ecology has not chosen to draft its own PSD permitting rules, but rather to adopt or incorporate the federal PSD regulations by reference. Because the federal PSD regulations cannot be directly implemented by a State or local agency without change, Ecology has incorporated them by reference with certain additions and modifications. Specifically, certain instances of the term "Administrator" in the federal PSD regulations have been modified to refer to the Director of Ecology or local air authority, and certain other instances of the term "Administrator" have been modified to be both the EPA Administrator and the Director of Ecology; the term "secondary emissions" has been redefined consistent with the court decision in NRDC v. EPA, 725 F.2d 761 (D.C. Circuit 1984); EPA's public participation procedures in 40 CFR 52.21(q) and 40 CFR 124 have been replaced with the procedures in WAC 173-400-171 that EPA has determined comply with the requirements for approvable State PSD programs in 40 CFR 51.166(q); and the 40 CFR 52.21(o)(3) and (p) provisions for Class I areas have been replaced with the provisions of WAC 173-400-117 that EPA has determined comply with the requirements for approvable State PSD programs in 40 CFR 51.166(p) and 51.307.

Note that Ecology has not adopted by reference certain provisions of 40 CFR 52.21 that are not direct elements of the permitting process or are not delegable to States, specifically 52.21(a) *Plan disapproval*, 52.21(e) *Restrictions on area classifications*, 52.21(g) *Redesignation*, 52.21(5) *Environmental impact statements*, 52.21 (t) *Disputed permits or redesignations*, and

52.21(u) *Delegation of authority*. In addition, Ecology has chosen to adopt its own definitions (rather than adopt the federal definitions by reference) of certain terms because they are also used elsewhere in its rules, specifically, the terms "major modification," "major stationary source," "net emissions increase," "significant," and "volatile organic compound." The definitions of the terms "major modification," "major stationary source," and "net emissions increase" are essentially the same as the EPA definitions in 40 CFR 52.21(b), but have been revised to conform to the 1990 Clean Air Act Amendments per the "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" (57 FR 13498, April 16, 1992). The definition of the term "significant" is identical to the EPA definition in 40 CFR 52.21(b) except that the hazardous air pollutants have been deleted in accordance with section 112(b)(6) of the Act and ozone depleting substances have been added in accordance with the 1990 Clean Air Act Amendments and EPA guidance. The definition of the term "volatile organic compound" is identical to the current EPA definition in 40 CFR 51.100(s).

Determination that Ecology Can Receive Full Delegation

In order to receive full delegation of the federal PSD regulations, a State or local authority must demonstrate that it has the adequate legal authority to implement and enforce the federal PSD regulations or State/local regulations that are equivalent or more stringent in every respect. Since EPA's PSD regulations remain in effect as the requirements of the EPA-promulgated SIP, they are the federally-enforceable requirements of the Act that apply in that State:

As discussed above, Ecology has adopted EPA's regulations by reference with certain minor changes. These changes simply revise portions of the rules so that Ecology has the authority as a matter of State law to implement and enforce the rules. None of the changes affect the stringency of the program nor the applicability of requirements to new or modified major stationary sources. As such, EPA has determined that Ecology has adequate authority to implement a State PSD program that is at least as stringent as the EPA PSD program in all respects.

**Agreement for Delegation of the Federal
Prevention of Significant Deterioration (PSD) Program
by the United State Environmental Protection Agency, Region 10
to the State of Washington Department of Ecology**

I. Introduction

Through this agreement, the Washington State Department of Ecology (Ecology) and the Environmental Protection Agency (EPA) establish the legal and procedural bases for Ecology to conduct new source review and to implement and enforce the federal PSD regulations found in 40 CFR 52.21.

II. Legal Authority

- A. Pursuant to 40 CFR 52.21(u), EPA may delegate to a State the responsibility for conducting new source review pursuant to the federal PSD regulations found in 40 CFR 52.21 (2001).
- B. Ecology has adopted by reference, with certain minor changes, the federal PSD regulations found in 40 CFR 52.21, as in effect on July 1, 2000 (federal PSD regulations). See WAC 173-400-117, 141, and 171 (effective 9/15/01). The changes simply revise portions of the rules so that Ecology has the authority as a matter of State law to implement and enforce the rules. EPA has determined that Ecology has adequate authority to implement and enforce the federal PSD regulations.¹
- C. EPA has determined that Chapter 43.05 of the Revised Code of Washington (RCW), often referred to as "House Bill 1010," conflicts with the delegation requirements of 40 CFR 52.21(u). Based on this determination, Ecology has determined that Chapter 43.05 RCW does not apply to permit to construct requirements of Chapter 173-400 WAC, including the PSD permitting program found at WAC 173-400-141.
- D. The Ecology Division of the Washington Attorney General's Office has issued an opinion² stating that the provisions of RCW 70.94.035, "Air Technical Assistance Visits by Ecology," do not prevent enforcement actions, but only require Ecology to wait until the end of the correction period to determine whether enforcement action is appropriate. Based on that opinion letter, EPA has determined that RCW 70.94.035 does not impermissibly interfere with Washington's enforcement authority. See 59 FR 42552 (August 18, 1994) (proposed interim approval of Washington's title V program).

¹ EPA's PSD regulations at 40 CFR 52.21 have not been revised since the July 1, 2000 version that Ecology has adopted by reference into WAC 173-400-141.

² Letter from Mary Sue Wilson, Assistant Attorney General, to Chuck Clarke, Regional Administrator, dated June 7, 1994, regarding Supplement to October 27, 1993 and December 30, 1993 Attorney General Opinion Letters for Washington State Department of Ecology.

III. **Scope of Delegation**

- A. Pursuant to 40 CFR 52.21(u), EPA hereby delegates to Ecology the responsibility for conducting new source review and for implementing and enforcing the federal PSD regulations for all sources located in the State of Washington, except as noted below, subject to the terms and conditions set forth in this delegation agreement.
- B. Ecology's delegation to conduct new source review and to implement and enforce the federal PSD regulations does not extend to sources or activities located in Indian Country, as defined in 18 U.S.C.1151. Consistent with previous federal program approvals or delegations, EPA will continue to implement the federal PSD program in Indian Country in Washington because Ecology did not adequately demonstrate its authority over sources and activities located within the exterior boundaries of Indian reservations and in other areas of Indian Country. The one exception is within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. § 1773, Congress explicitly provided State and local agencies in Washington authority over activities on non-trust land within the 1873 Survey Area. After consulting with the Puyallup Tribe of Indians, EPA's delegation in this agreement applies to sources and activities on non-trust lands within the 1873 Survey Area. Therefore, Ecology will implement and enforce the federal PSD requirements on these non-trust lands of the 1873 Survey Area.
- C. Ecology's delegation to conduct new source review and to implement and enforce the federal PSD regulations does not extend to sources or activities under the jurisdiction of the State of Washington Energy Facilities Site Evaluation Council (EFSEC).
- D. The EPA Administrator has delegated to the Director of the Region 10 Office of Air Quality, the authority to delegate the federal PSD regulations to any State or local agency. The State or local agency that receives delegation from EPA Region 10 does not have the authority under the federal Clean Air Act to further delegate the federal PSD regulations.

IV. **Requirements**

- A. The responsibility for conducting new source review and implementing the PSD regulations in Ecology rests with the Technical, Information and Engineering Section (TIES) of Ecology's Air Quality Program. TIES is responsible for, and shall conduct, all PSD applicability determinations, make final determinations, and write PSD permits for all regulated sources, including those under the jurisdiction of the Industrial Section, the Nuclear and Mixed Waste Program, and local air authorities in the State of Washington. Ecology will ensure that local air authorities are aware that all PSD applicability determinations must be made by Ecology.
- B. Ecology will ensure that there are adequate resources and trained personnel within the TIES to implement an effective PSD permit program. As requested, EPA will provide

technical assistance related to the federal PSD requirements, including without limitation, PSD applicability determinations, Best Available Control Technology (BACT) determinations, air quality monitoring network design, and modeling procedures. EPA will provide PSD training for Ecology staff to meet needs identified by EPA or Ecology.

- C. Where the rules or policies of Ecology are more stringent than the federal PSD program, Ecology may elect to include such requirements in the PSD permit along with the EPA requirements.
- D. If both a state or local regulation and a federal regulation apply to the same source, both must be complied with, regardless of whether one is more stringent than the other.
- E. Ecology will follow all PSD policy, guidance, and determinations issued by EPA for implementing the federal PSD program. EPA will provide Ecology with copies of EPA policies, guidance, and determinations through the Region 7 NSR database and/or hard copies where appropriate. Where no current EPA policy or guidance clearly covers a specific situation, Ecology shall consult with the EPA Office of Air Quality on its proposed interpretation of the EPA regulations.
- F. Ecology will at no time grant a waiver to the requirements of 40 CFR 52.21 or to the requirements of an issued PSD permit.
- G. Ecology shall consult with the appropriate State and local agency primarily responsible for managing land use prior to making any preliminary or final determination as provided in 40 CFR 52.21(u)(2)(i).
- H. In order to assist EPA in carrying out its responsibilities under Section 7 of the Endangered Species Act (ESA) 16 U.S.C. § 1531 et seq., and 50 C.F.R., part 402, subpart B ("Consultation Procedures"), and with Section 305(b)(2) of the Magnuson-Stevens Fishery and Conservation Act ("Magnuson-Stevens. Act"), 16 U.S.C. § 1801 et seq., and 50 C.F.R., part 600, subpart K ("EFH Coordination, Consultation, and Recommendations"), regarding essential fish habitat, Ecology shall:
 - 1. Within 5 working days of receipt of a complete PSD permit application, notify the U. S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS), as appropriate, of the permit application, and to provide a copy of the permit application if requested.
 - 2. Notify applicants of the potential need for consultation between EPA and FWS and/or NMFS if the project may affect an endangered species, or if the project may affect essential fish habitat.
 - 3. Refrain from issuing a final PSD permit until EPA has notified Ecology that EPA has satisfied its obligations, if any, under the ESA and/or the Magnuson-Stevens Act.

V. Permit Issuance, Modification, and Appeals

- A. All preliminary and final determinations issued by Ecology shall indicate that an appeal to the EPA Administrator is available pursuant to 40 CFR part 124.
- B. The permit provisions in 40 CFR 124.19 shall apply to all appeals to the EPA Administrator on PSD permits issued by Ecology under this delegation. For purposes of implementing the Federal permit appeal provisions under this delegation, if there is a public comment requesting a change in a preliminary determination or proposed permit condition, the final permit issued by Ecology is required to state that for federal PSD purposes and in accordance with 40 CFR 124.15 and 124.19:
 - 1. The effective date of the permit is 30 days after service of notice to the applicant and commentors of the final decision to issue, modify, or revoke and reissue the permit, unless review is requested on the permit under 40 CFR 124.19 within the 30 day period.
 - 2. If an appeal is made to the EPA Administrator, the effective date of the permit is suspended until such time as the appeal is resolved.
- C. Modifications to existing PSD permits, except for administrative amendments, shall be processed in accordance with all of the substantive and procedural requirements applicable to new permits.
- D. Failure by Ecology to comply with the requirements of 40 CFR part 124 related to PSD permits and Section V. shall render the subject permit invalid for federal PSD purposes.

VI. Enforcement

- A. Ecology or the local air authority with jurisdiction over the source will have the primary responsibility for enforcing the federal PSD regulations for sources subject to this delegation agreement, provided however that Ecology shall have the responsibility under this delegation to enforce the federal PSD regulations in the event that a local air authority does not. Nevertheless, EPA may exercise authority pursuant to section 113 of the Clean Air Act with respect to sources that are subject to the federal PSD requirements, including federal PSD permits issued by Ecology.
- B. In delegated programs, the role of the State and local agencies is that of primary enforcer or "front line" agency in program implementation. This includes helping to define EPA's role in the regulated community for a given program. EPA's principal role is "back up" for the State/local program. However, EPA will initiate an enforcement action, as appropriate, under the following circumstances:
 - 1. At the State or local air agency's request;
 - 2. If a State or local air agency action is determined to be inadequate, or the

- State/local agency fails to carry out action in a timely or appropriate manner (in this situation, the parties will adhere to the "no surprises" principle and will follow the conflict resolution process described in Section IX of the *Washington State Compliance Assurance Agreement for Air Programs (October 1999)*; and/or
3. As part of EPA's role established in the collaborative planning process, which includes those situations where national, regional, or sector initiatives warrant an EPA lead.
- C. PSD enforcement actions will be undertaken by qualified inspectors or trained enforcement staff in Ecology's Central Regional Office, Eastern Regional Office, Industrial Section, and Nuclear and Mixed Waste Program, or in local air authorities.
 - D. Enforcement of the federal PSD regulations is subject to the *Washington State Compliance Assurance Agreement for Air Programs (October 1999)*, signed by both the State and local agencies. This clearly defines roles and responsibilities, including timely and appropriate enforcement response and the maintenance of the Aerometric Information Retrieval System/Aerometric Facility Subsystem (AIRS/AFS).

VII. EPA and Ecology Communications

- A. Ecology shall submit to EPA copies of the following documents for sources or activities subject to WAC 173-400-141 "Prevention of Significant Deterioration" within the timeframes indicated.

Action	Submittal to EPA	Timeframe
Receipt of PSD permit application	Copy of application and cover letter	Within five working days of receipt
Completeness determination or letter of deficiencies	Copy of letter to applicant	Within five working days after signature
Transmittal to FLM of PSD application	Copy of letter	Within five working days after signature
Receipt of comments from FLM	Copy of comment letter	Within five working days of receipt
Preliminary Determination, Proposed Permit, Public Notice	Copy of Preliminary Determination, Proposed Permit, and Public Notice	Within five working days after completion of Preliminary Determination
Public Notice of Hearing (see 52.2(u)(2)(ii))	Copy of notice	Prior to publication

Receipt of comments from public	Copy of public comment letter(s)	Within five working days of the close of the public comment period
Final Determination, PSD permit and transmittal letter	Copy of PSD permit and transmittal letter	Within five working days after final signature on PSD permit
BACT Determination submittal to RACT/BACT/LAER Clearinghouse	Electronic or paper submittal of required information	Within 20 working days of final signature on PSD permit

- B. Ecology shall submit to EPA, within 5 working days of signature, copies of all written determinations regarding whether a proposed new source or modification is subject to PSD or exempt from PSD.
- C. Ecology and EPA should communicate sufficiently to guarantee that each is fully informed and current regarding interpretation of federal PSD regulations (including any unique questions about PSD applicability). Any records or reports relating to PSD permitting or compliance with PSD requirements that are provided to or otherwise obtained by Ecology should be made available to EPA upon request.
- D. Ecology will work with owners and operators of sources and activities subject to the federal PSD regulations to ensure all required information is submitted to Ecology. Ecology will ensure that the information set forth in paragraphs VII. A. and B is provided to EPA as set forth in those paragraphs and that all other information is submitted to EPA upon request.
- E. Ecology will ensure that all relevant source information, notifications and reports are entered into the EPA AIRS/AFS national database system in order to meet its record keeping and reporting requirements. In addition to the National Minimal Data Requirements (MDRs) (attached), Ecology shall enter the following information or activities:
1. The Air Program Code for PSD
 2. The date the PSD permit is issued or modified
 3. The final effective date of the PSD permit (or modified permit)
 4. The date that the new source or modification begins construction; and
 5. The date that the new source or modification begins operation.

VIII. Future EPA Regulation Revisions

- A. Ecology's delegation to conduct new source review and to implement and enforce the federal PSD regulations does not extend to revisions to 40 CFR 52.21 which occur, or

have occurred, after July 1, 2000.

- B. Ecology will update WAC 173-400-141 to incorporate new or revised federal PSD regulations and amend or revise this delegation agreement as expeditiously as possible after the effective date of any revisions to the federal PSD regulations.
- C. A new request for delegation will be required for any changes to 40 CFR Part 52.21 promulgated after the effective date of this delegation. Implementation and enforcement of new or revised requirements will remain the sole responsibility of EPA until the Ecology revises Chapter 173-400 WAC and submits a new delegation request.

IX. Administrative

- A. This delegation supersedes the previously delegated authority contained in the September 30, 1983 letter to Ecology from the EPA Regional Administrator and the June 4, 1992 Agreement for Delegation.
- B. If, after consultation with Ecology, EPA makes any of the following determinations, this delegation may be revoked in whole or in part. Any such revocation shall be effective as of the date specified in a *Notice of Revocation*.
 - 1. Ecology's legal authority, rules and regulations, and/or procedures for implementing or enforcing the federal PSD requirements are inadequate;
 - 2. Ecology is not adequately implementing or enforcing the federal PSD program; or
 - 3. Ecology has not implemented the requirements or guidance with respect to a specific permit in accordance with the terms and conditions of this delegation, the requirements of 40 CFR 52.21, 40 CFR 124, or the Clean Air Act.
- C. In the event that Ecology is unwilling or unable to implement or enforce the federal PSD regulations with respect to a source or activity subject to the federal PSD regulations, Ecology will immediately notify the Director of the Office of Air Quality. Failure to notify the Director of the Office of Air Quality does not preclude EPA from exercising its enforcement authority.
- D. EPA may review the state PSD permitting program as part of the review of the Performance Partnership Agreement (PPA) or any other appropriate agreement. EPA may review State procedures and recommend changes as necessary. All recommendations will be in writing.
- E. In the event that EPA or Ecology regulations or policies change, this delegation shall either be amended to ensure the continued implementation of EPA's PSD regulations or the delegation shall be revoked.

X. Signatures

On behalf of the Environmental Protection Agency, I delegate the federal PSD program, 40 CFR 52.21, to the Washington Department of Ecology pursuant to the terms and conditions of this delegation agreement and the requirements of the Clean Air Act.

Date: 2/7/02

Barbara McAllister

Director
Office of Air Quality
Environmental Protection Agency
Region 10

On behalf of the State of Washington and the Department of Ecology, I accept the delegation of the federal Prevention of Significant Deterioration program, 40 CFR 52.21, program pursuant to the terms and conditions of this delegation agreement and the requirements of the Clean Air Act.

Date: 7 February 2002

Mary E. Bury

Manager
Air Quality Program
State of Washington
Department of Ecology